

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

ROBERT L. BIEKER
Claimant

VS.

KANSAS GAS SERVICE/ONEOK, INC.
Respondent
Self-Insured

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Docket No. 250,996

ORDER

Respondent requests Appeals Board review of Assistant Director Kenneth J. Hursh's March 27, 2001, Award. The Appeals Board heard oral argument on December 18, 2001.

APPEARANCES

Claimant appeared by his attorney, James E. Martin of Overland Park, Kansas. Respondent, a qualified self-insured, appeared by its attorney Larry G. Karns of Topeka, Kansas.

RECORD AND STIPULATIONS

The Appeals Board (Board) has considered the record and has adopted the stipulations listed in the Award.

ISSUES

The Assistant Director found claimant injured his cervical spine while working for respondent on March 22, 1999. As a result of that injury, claimant was awarded a 5 percent permanent partial general disability based on his permanent whole body functional impairment rating.

Respondent appeals and contends that claimant failed to prove he injured his cervical spine while using the "spud bar" while working for the respondent on March 22, 1999. Respondent argues the record instead proves that claimant injured his cervical spine while working in his yard at home on March 20, 1999. Accordingly, the respondent requests the Board to reverse the Assistant Director's Award and deny claimant's request for benefits. Respondent also requests the Board not to consider as a part of the record claimant's affidavit enclosed with his March 2, 2001, submission letter to Administrative Law Judge (ALJ) Robert H. Foerschler. The affidavit was submitted after each of the parties' terminal dates had expired and the record was closed. Respondent argues

claimant had the opportunity at the regular hearing to address the issues discussed in the affidavit and failed to do so.

Conversely, claimant requests the Board to affirm the Award. Claimant argues his testimony coupled with the medical opinion of orthopedic surgeon Edward J. Prostic, M.D., proved he sustained a permanent injury to his cervical spine on March 22, 1999, while working for the respondent. Claimant also argues that his affidavit included in his March 2, 2001, submission letter to the ALJ is admissible and should be a part of the record for this decision.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record, considering the briefs and the parties' arguments, the Board makes the following findings and conclusions:

The first issue the Board will address is the admissibility of claimant's affidavit enclosed with his March 2, 2001, submission letter to the ALJ. Claimant argues the affidavit is admissible because he was surprised at the regular hearing by respondent producing chiropractor Anthony Phillips' treatment records. The purpose of claimant's affidavit is only to clarify that he denies he saw Dr. Phillips on March 20, 1999, and further denied that he received or wore a cervical collar prescribed by Dr. Phillips. Moreover, claimant argues because of scheduling difficulties, the affidavit serves the same purpose as claimant appearing for another deposition.

Dr. Phillips' treatment records produced by respondent at the regular hearing and admitted into evidence at Dr. Phillips' deposition only consist of two pages. At the regular hearing, claimant had the opportunity to review those two pages of records and to otherwise rebut Dr. Phillips' statements outlined in those records through claimant's testimony. Claimant also had the opportunity to cross examine Dr. Phillips concerning both his testimony and his treatment records during Dr. Phillips' deposition.

Additionally, claimant filed a Motion to Extend Terminal Dates which was heard by the ALJ on December 26, 2000. That request to extend claimant's terminal date was to allow claimant to depose respondent's safety coordinator Keith Buchele. No request was made to extend claimant's terminal date for the purpose of taking claimant's deposition to rebut Dr. Phillips' statements contained in his treatment records. Thus, the Board finds that respondent's objection to the claimant's affidavit being part of the record should be sustained.

Before claimant's alleged March 22, 1999, work-related accident, claimant was involved in two work-related motor vehicle accidents. The first occurred on February 27, 1997, and the second occurred on May 13, 1997. Both accidents happened while claimant was stopped in the company truck and the truck was rear-ended by another motor vehicle. Claimant suffered injuries to what he described as the left side of his neck and left shoulder

as a result of both of the accidents. In contrast, claimant testified that the March 22, 1999, accident injured the right side of his neck and his right shoulder with pain radiating down his right arm.

Claimant filed workers compensation claims for both motor vehicle accidents and settled both of those claims on March 4, 1999, based on a 6.5 percent permanent whole body functional impairment. Claimant also gave up his right to future medical treatment in the settlement.

Claimant now alleges that he injured the right side of his neck, right shoulder and has pain radiating down his right arm as a result of pulling out a "spud bar" while testing for gas leaks for respondent on March 22, 1999. Claimant testified he reported the accident on March 22, 1999, to his supervisor and his supervisor then took him for medical treatment to Occupational Health Services. Claimant was treated by several physicians at Occupational Health Services and then eventually was referred to and came under the treatment of orthopedic surgeon Robert T. Bruce, M.D.

Dr. Bruce first saw claimant on April 8, 1999. Claimant gave Dr. Bruce a history of injuring his neck, right shoulder and right arm on March 22, 1999, while working for respondent. Dr. Bruce's initial impression was right C6-7 radiculopathy as found by EMG testing. Dr. Bruce ordered a MRI examination that found considerable arthritis and abnormal movement at C6-7 causing radiculopathy in claimant's right arm. Dr. Bruce had claimant undergo cervical epidural blocks.

Dr. Bruce treated claimant conservatively through August 3, 1999. But because claimant's symptoms continued he discussed with the claimant the option of cervical discectomy and fusion. Cervical myelogram and CT scans showed stenosis on the right at C6-7, which could be affecting the C-7 nerve root. Dr. Bruce also found claimant depressed. He released claimant to regular work with a 30 pound lifting restriction. He instructed claimant that after he had his depression under control, he could return and if he had not made any improvement he would refer claimant to a surgeon for possible cervical fusion.

At Dr. Bruce's deposition, he opined that he did not think that claimant's cervical stenosis at C6-7 which was causing claimant's right side radiculopathy could have been caused by using the "spud bar" at work. Dr. Bruce went on to opine that claimant had no right shoulder and no right arm permanent impairment of function. Because of claimant's C6-7 radiculopathy, Dr. Bruce did opine, in accordance with the American Medical Association, Guides to the Evaluation of Permanent Impairment, Fourth Edition (AMA Guides, Fourth Edition), that claimant had a 15 percent permanent impairment of function. But Dr. Bruce did not relate the C6-7 radiculopathy to claimant's using the "spud bar" at work.

At claimant's attorney's request, Dr. Prostin examined and evaluated claimant on July 17, 2000. Dr. Prostin had also previously examined and evaluated claimant for his 1997 cervical injuries. Dr. Prostin last saw claimant on December 14, 1998, for his 1997 injuries. After Dr. Prostin examined claimant on July 17, 2000, he opined that claimant had suffered additional injury at work on March 22, 1999, as he was pulling the "spud bar" out of the ground. He diagnosed claimant with severe disc degeneration and anterior subluxation at C6-7. He further opined that claimant's March 22, 1999, accident was superimposed upon the preexisting disc disease. In accordance with the AMA Guides, Fourth Edition, he assessed claimant's permanent impairment of function at 15 percent. He then testified that 10 percent of the permanent impairment of function was related to the 1997 work-related accidents and claimant's March 22, 1999, work-related accident caused the additional 5 percent.

At the regular hearing, on direct examination, claimant was specifically asked, "But have you ever had injuries to your right side of your neck as you're describing you sustained in this accident?" Claimant answered, "No, I have not."¹ During cross examination, claimant was also asked, "Had you had problems on the right side before February 22, 1999 [sic]?" Claimant replied, "No, I did not."²

Chiropractor Anthony Phillips also testified in this case. Dr. Phillips had previously treated claimant in 1997 and 1998. And he did not see claimant again until Saturday, March 20, 1999. On that date, Dr. Phillips testified claimant had reached him on his mobile phone. Dr. Phillips testified that claimant had told him, ". . .that he was having pain in his neck and some numbness and tingling in his hand, and that he wanted to know if I could see him that day, and so I met him in the office."³ Dr. Phillips further testified that claimant told him, ". . .that he had been working in the yard that morning and started feeling pain."⁴ Dr. Phillips' March 20, 1999, treatment record indicates that claimant was complaining of pain in the neck, right shoulder, and numbness in the right hand. Dr. Phillips' assessment of claimant's condition was cervical disc syndrome. He treated claimant with manual distraction, ultrasound and light manipulation. He also placed claimant in a soft cervical collar.

Claimant returned to see Dr. Phillips on the date of his alleged work-related accident, March 22, 1999, at 4:15 p.m. Claimant did not report to Dr. Phillips that he had a work-related accident that day. In fact, Dr. Phillips' March 22, 1999, treatment record indicates claimant felt better the night before and had less pain in his neck.

¹ Regular hearing transcript, November 14, 2000, p.15.

² Regular hearing transcript, November 14, 2000, p.29.

³ Dr. Phillips' deposition, December 14, 2000, p.5.

⁴ Dr. Phillips' deposition, December 14, 2000, p.5.

Dr. Phillips treated claimant on six other occasions with April 9, 1999, being the last date of treatment. During Dr. Phillips' March 24, 1999, treatment of claimant, the treatment record indicates that claimant was wearing the prescribed cervical collar. Dr. Phillips' treatment records do not contain a statement that claimant's pain in his neck, right shoulder and right arm is related to using a "spud bar" while working for the respondent.

As noted above, claimant's last treatment with Dr. Phillips was on April 9, 1999, and the first time that he saw Dr. Bruce for his alleged March 22, 1999 work accident was on April 8, 1999. Claimant testified at the regular hearing that he had no injuries that resulted in right-sided neck pain before the March 22, 1999, accident. Moreover, claimant could not recall if he told Dr. Phillips on March 20, 1999, that he had injured the right side of his neck, right shoulder and right hand. Also, claimant could not recall if Dr. Phillips had prescribed a cervical collar for him to wear.

After the Assistant Director viewed the videotape of claimant demonstrating the use of the "spud bar" that required claimant to move his arms forcibly on a repetitive basis, he found it hard to believe that a reputable employer and claimant's treating orthopedic surgeon could not relate claimant's cervical radiculopathy to that work activity. Because Dr. Prostic did not have any problems relating claimant's current injury to work claimant performed on March 22, 1999, the Assistant Director awarded claimant a 5 percent permanent partial general disability.

The Board also has viewed the videotape of claimant demonstrating the use of the "spud bar" at work. The Board agrees with the Assistant Director's conclusion that the type of work activity depicted requires forceful and repetitive movements that probably could cause an aggravation of a preexisting degenerative condition in a worker's cervical spine. But the problem that arises in this case is the question of whether claimant aggravated a preexisting cervical condition while working for the respondent on March 22, 1999, or while working in his yard on March 20, 1999.

Claimant's testimony is in conflict with Dr. Phillips' testimony and Dr. Phillips' treatment record. The Board finds significant that there is no evidence contained in the record to conclude Dr. Phillips was not candid and truthful about the date he first treated claimant for his right-sided injuries, the history claimant provided him, and the fact that claimant never mentioned, during his course of treatment, that he was injured at work. Additionally, the Board finds very questionable the fact that claimant could not recall whether Dr. Phillips prescribed a cervical collar for him to wear as contained in Dr. Phillips' March 20, 1999, treatment record. The cervical collar is again mentioned in Dr. Phillips' March 24, 1999, treatment record indicating that claimant related to Dr. Phillips that he had less pain and numbness while wearing the cervical collar.

The Board concludes, because of the conflict between claimant's testimony and Dr. Phillips' testimony and treatment records, that claimant's credibility is very much in question. Thus, the Board finds claimant has failed to meet his burden of proving by a preponderance of the credible evidence that it is more probably true than not that he

injured his neck, right shoulder and right arm while he was using the "spud bar" while working for the respondent on March 22, 1999.

AWARD

WHEREFORE, it is the finding, decision, and order of the Board that Assistant Director Kenneth J. Hursh's March 27, 2001, Award is reversed and claimant is denied benefits because he failed to prove he suffered personal injury by accident on March 22, 1999, that arose out of and in the course of his employment.

IT IS SO ORDERED.

Dated this ____ day of August 2002.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: James E. Martin, Attorney for Claimant
 Larry G. Karns, Attorney for Respondent
 Robert H. Foerschler, Administrative Law Judge
 Philip S. Harness, Workers Compensation Director